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No. 243

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

JULIUS H. WOLPE, et al., *Petitioners,*

v.

HARRY PORETSKY, et al., *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF

H. WINSHIP WHEATLEY,
H. WINSHIP WHEATLEY, JR.,
Attorneys for Petitioners.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

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Appellants,

v.

HARRY PORETSKY
ARTHUR W. MACHEN,
Trustee
THOMAS MACHEN
CHARLES W. KUTZ
JOHN RUSSELL YOUNG
GUY MASON
DAVID LYNN
NEWTON B. DREWRY

} as members of the Zoning Commission of the District of Columbia

Appellees.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Your petitioners, Julius H. Wolpe et al, all of whose names are set forth in the caption hereof, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered on April 3, 1946 (R. 153), (petition for rehearing denied April 18, 1946) (R. 163), in a suit entitled "Julius H. Wolpe et al v. Harry Poretsky et al," Number 8952, affirming a judgment of the District Court of the United States for the District of Columbia setting aside an order of the Zoning Commission of the District of Columbia.

The writ of certiorari is sought on the ground that the question presented is one of general importance in the administration of the zoning law of the District of Columbia, and because the United States Court of Appeals for the District of Columbia has decided an important question of local law in a way inconsistent with the decisions of this Court determining the functions of a reviewing court.

Summary and Short Statement of Matter Involved

The Court of Appeals has apparently substituted its own judgment for that of the Zoning Commission (R. 154), and has adhered to its decision, notwithstanding a petition for rehearing on that ground (R. 163).

The Zoning Commission was created by Congress to regulate the uses of land in the National Capital (Title 5, Secs. 412 et seq, D. C. Code 1940). It consists of the Commissioners of the District of Columbia, the Director of the National Park Service, and the Architect of the Capitol (Title 5, Sec. 412, D. C. Code 1940).

The zoning regulations of the District of Columbia permitted no apartment houses to be built on 16th Street,

Northwest, from Piney Branch Parkway north to the District Line, some four miles, except on the block known as parcel 70/100 at 16th and Shepherd Streets, and a tiny tip of land (about one thousand square feet in triangular shape) on the opposite side of 16th Street; after a full public hearing and exhaustive study, the Zoning Commission of the District of Columbia made an order preventing the use of parcel 70/100 as an apartment site; Poretsky, who had contracted to buy parcel 70/100 to build an apartment house on it, filed a suit in the District Court of the United States for the District of Columbia against the Zoning Commission to rechange the zoning to permit an apartment house; when the case came on for trial, the trial judge held the Zoning Commission's action arbitrary and capricious, null and void, and ordered the apartment house zoning restored (R. 56).

After argument in the Court of Appeals, the judges of that court apparently viewed the property, and on the basis of what they saw and what they found to be the then housing shortage, affirmed the judgment (R. 153, 155).

The decision in the appellate court was on April 3, 1946. The decision in the Zoning Commission was on November 7, 1941 (R. 12).

The position of the petitioners has been that the question involved was whether the Zoning Commission acted capriciously, but both courts were obviously looking at the case as though they were the Zoning Commission, and not a trial court in one instance, and an appellate court in the other, charged only with the duty of determining whether the Zoning Commission had acted arbitrarily and capriciously.

A Further Statement of the History of the Case

On November 7, 1941, after a public hearing held on October 8, 1941 (R. 88), the Zoning Commission rezoned the property herein involved, known as parcel 70/100, situated at the southwest corner of 16th and Shepherd Streets, Northwest, so as to permit the erection of only wholly de-

tached, single-family dwellings, with two side yards, and churches (also schools, when approved by the Board of Zoning Adjustment) (R. 48).

On February 11, 1942, respondent Poretsky, contract purchaser of this property, filed a civil action as plaintiff against the Zoning Commission for injunctive and other relief, in which he asked that the Zoning Commission's order of November 7, 1941 be "declared unconstitutional, illegal, null and void, and of no force and effect", and that a mandatory injunction issue nullifying the said order of the Zoning Commission, and enjoining it from enforcing or carrying it into effect (R. 3).

Subsequently leave to intervene was sought by and granted to Arthur W. Machen, Trustee and Thomas Machen, vendors to Poretsky. They adopted the allegations of plaintiff and prayed for similar relief (R. 25). The Machens' interest was hostile to that of the petitioners herein.

The District Court decided in favor of the plaintiff, and on April 7, 1943, entered a judgment that the order of the Zoning Commission made on November 7, 1941 be "vacated and set aside and held for naught", permanently enjoined it from carrying into force and effect the order made on November 7, 1941, and directed it forthwith to restore the zoning of said parcel to that existing prior to November 7, 1941 (R. 56).

The petitioners herein then asked for leave to intervene to move for a new trial, or, in the alternative, to appeal to the United States Court of Appeals for the District of Columbia (R. 57). This motion was denied by the District Court in its order of May 21, 1943 (R. 78). Upon appeal to the Court of Appeals from the denial of the motion for leave to intervene, the Court of Appeals reversed the District Court (79 U. S. App. D. C. 141, 144 F. (2d) 505) and held:

> "When they (petitioners herein) filed their petition for intervention, appellants had all the rights of a party at that stage of the proceedings. This, of course, includes the right of appeal. Since the time for appeal

had not expired when appellants sought to intervene, they should be made parties with the right to appeal, and all other rights a party might exercise at the time their intervention was filed."

Petition for certiorari as to this decision was denied by this Court in case Number 579, October term, 1944.

The petitioners' rights having been established by the above mentioned decision, they appealed from the judgment of the District Court of April 7, 1943, and on April 3, 1946, the Court of Appeals affirmed the decision of the trial court setting aside the order of the Zoning Commission of November 7, 1941 (R. 153-155). On April 17, 1946, petitioners herein petitioned the Court of Appeals for rehearing (R. 156), which was denied on April 18, 1946 (R. 163).

Concise Statement of the Grounds on Which the Jurisdiction of This Court is Invoked

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended (28 U. S. C. A. Sec. 347(a)).

Statutes, Treaties, Regulations, and Rules Involved

The statute involved is the Zoning Act for the District of Columbia (Act of March 1, 1920, 41 Stat. 500, amended by Act of June 30, 1938, 52 Stat. 797, D. C. Code, 1940 edition, Title 5, Secs. 412, 413, and 414), set out in accompanying brief.

Question Presented

Whether the Court of Appeals and District Court may substitute their judgment for that of the Zoning Commission, and vacate and set aside as null and void an order of said Commission made pursuant to law, amply supported by evidence, and openly arrived at after full consideration of all the facts at a public hearing.

Reasons for Allowance of Writ

The affirmance by the Court of Appeals of the decision of the District Court conflicts with the principle announced by this Court in *Zahn* v. *Board of Public Works of the City of Los Angeles*, 274 U. S. 325, 71 L. Ed. 1074; *United States* v. *Pierce Auto Freight Lines*, Number 74, October Term 1945, and *Dobson* v. *Commissioner*, 320 U. S. 489, 88 L. Ed. 248, as well as the principles announced by the United States Court of Appeals for the District of Columbia in *Wolpe et al* v. *Poretsky et al, decided* June 19, 1944, 79 U. S. App. D. C. 141, 144 F. (2d) 505, certiorari denied, Number 579, October Term 1944.

The Court of Appeals in its opinion stated that "the Commission's order singled out lot 70/100 for special or 'spot' zoning" (R. 153). The Zoning Commission specifically held that the zoning of this property prior to November 7, 1941 was "spot" zoning, and that its order of November 7, 1941 corrected and nullified a spot zoning situation, and emphasized that fact in its minutes (R. 94, 95).

The Zoning Commission further emphasized the fact that the zoning of this parcel in effect prior to its order of November 7, 1941 bore no relation whatsoever to any comprehensive zoning plan for this area (R. 94, 95).

In their decisions, the District Court and the Court of Appeals erroneously substituted their respective judgments for that of the Zoning Commission. The two courts obviously tried the case de novo, without considering the fact that the law lodged the power of decision in the Zoning Commission.

The Zoning Commission, in reaching its decision, had before it a majority and a minority report of the Zoning Advisory Council (R. 91-95), and after due deliberation it adopted the minority report, and in its minutes stated:

> "In taking this action the Commission rejected the report and recommendation of the Zoning Advisory Council adopting the minority report of that Council. The Commission also desired to be recorded as empha-

sizing the fact that in its opinion the residential 60 A area classification of parcel 70/100 is spot zoning bearing no relation whatsoever to any comprehensive zone plan for this area; and further, that the recent detached home construction in the section of 16th Street north of Piney Branch Parkway has definitely determined and settled for many years its restricted character." (R. 94, 95.)

(The 60 A area referred to above relates to the classification in effect prior to the issuance of the Zoning Commission's order of November 7, 1941.)

The action of the Zoning Commission in promulgating its order of November 7, 1941 was not arbitrary, capricious, or unreasonable, but was supported by the evidence, and was a proper discharge of the administrative function imposed on it by law.

Conclusion

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of April 3, 1946, of the United States Court of Appeals for the District of Columbia in case Number 8952 in said Court should be granted and the said judgment reversed.

Respectfully submitted,

H. WINSHIP WHEATLEY,
H. WINSHIP WHEATLEY, JR.,
Attorneys for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. ——.

JULIUS H. WOLPE, et al., *Petitioners,*

v.

HARRY PORETSKY, et al., *Respondents.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Opinion Below

The petition seeks a writ directed to the United States Court of Appeals for the District of Columbia, to review a judgment rendered by it in the suit there entitled "Julius H. Wolpe et al v. Harry Poretsky et al," reported in 154 F. (2d) 330 (R. 153).

Jurisdiction

The grounds upon which the jurisdiction of this Court is invoked have been set forth in the petition.

Statement of Case

The facts have been stated in the petition. Additional facts will be set out in the detailed discussion of each error of fact and of law as they are hereinafter discussed.

Specification of Errors

1. The Courts below, in holding null and void the order of the Zoning Commission dated November 7, 1941, substituted their judgment for that of the Commission, contrary to the principles of law announced by this Court in other cases, and as announced by the Court of Appeals in its prior decision granting your petitioners the right to intervene.

2. The Court below erroneously considered this matter as an appeal on the merits of the issues presented to the Zoning Commission.

3. The Court below erroneously held that the order of November 7, 1941 was "spot zoning", directly contrary to the view of the Zoning Commission, which view it emphasized in its minutes.

4. The order of the Zoning Commission of November 7, 1941 was not arbitrary, unreasonable, or capricious, but was fully justified by the evidence, and was in furtherance of a comprehensive zoning plan for the District of Columbia, and a proper discharge of the function imposed on it by law.

5. The Courts below, in setting aside the zoning order of November 7, 1941, and ordering that the previous zoning of parcel 70/100 be restored, did so in violation of a comprehensive zoning plan which the Commission sought to adopt in discharge of the duty placed on it by law, and violated one of the objectives of the zoning law provided in Section 5-414 of the District of Columbia Code, 1940, of "encouraging stability of districts and of land values therein".

6. The restoration of the zoning of parcel 70/100 as ordered by the Court below permitting the erection of an apartment house on 16th Street north of Piney Branch Parkway, the natural boundary line between single family and multiple family dwellings, sought to be established by the Zoning Commission's order of November 7, 1941, will unsettle the district and the land values therein. If the order of the Court is permitted to stand, it will result in parcel 70/100 being the only site upon which an apartment house may be erected on 16th Street north of Piney Branch Parkway, except a tip of land which is so small as to be impracticable for use for such purpose.

7. The Courts below erred in holding that the zoning order of November 7, 1941 bears no substantial relation to the health, safety, morals, convenience, order, prosperity, or general welfare of the community.

Argument

The questions presented and errors of the Courts below are combined for the purpose of argument under two headings, viz.:

I. The Courts below misconceived their functions when they considered this case as an appeal on the issues presented to the Zoning Commission, and substituted their judgment for that of the Zoning Commission, contrary to principles announced by this Court.

II. The action of the Zoning Commission in promulgating its order of November 7, 1941 was amply supported by the evidence before it, was in furtherance of a comprehensive zoning plan for the District of Columbia, and was not unreasonable, arbitrary, or capricious.

I.

The courts below misconceived their functions when they considered this case as an appeal on the issues presented to the Zoning Commission, and substituted their judgment for that of the Zoning Commission, contrary to principles announced by this court.

The Zoning Act of the District of Columbia is codified in the 1940 edition of the District of Columbia Code. Title 5, sections 412 et seq, provide in part:

> "Sec. 412. *Zoning Commission created—Membership—Assignment of employees.* To protect the public health, secure the public safety, and to protect property in the District of Columbia there is hereby created a Zoning Commission, which shall consist of the Commissioners of the District of Columbia, Director of the National Park Service and the Architect of the Capitol, which said commission shall have all the powers and perform all the duties hereinafter specified and shall serve without additional compensation. * * *"
>
> "Sec. 413. *Zoning regulations to be made by Zoning Commission—Uniformity.* To promote the health, safety, morals, convenience, order, prosperity, or general welfare of the District of Columbia and its planning and orderly development as the national capital, the Zoning Commission * * * is hereby empowered * * * to regulate the location, height, bulk, number of stories and size of buildings and other structures, * * *. All such regulations shall be uniform, for each class or kind of building throughout each district * * *."
>
> "Sec. 414. *Purposes of zoning regulations.* Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the street, to secure safety from fire, panic, and other dangers, to promote health and the general welfare, to provide adequate light and air, to prevent the undue concentration of population and the overcrowding of land, and to promote such distribution of population and of the uses of land as would tend to create conditions favorable to health, safety, transportation, prosperity, protection of property, civic activity, and rec-

reational, educational, and cultural opportunities, and as would tend to further economy and efficiency in the supply of public services. Such regulations shall be made with reasonable consideration, among other things, of the character of the respective districts and their suitability for the uses provided in the regulations, and with a view to encouraging stability of districts and of land values therein."

Section 415 provides that before putting into effect any amendment of the regulations, public notice shall be given, and "at such hearing it shall afford any person present a reasonable opportunity to be heard".

In conformity with the above, notice of the public hearing for the proposed change in the zoning of parcel 70/100 was issued on September 8, 1941 (R. 36).

Such public hearing was held on October 8, 1941 (R. 88).

The Commission also had before it the majority and minority reports of the Zoning Advisory Council dated October 7 and 8, 1941 respectively (R. 88 and 92).

It retained this case on its agenda from October 8, 1941, (when the hearing was held), until November 7, 1941. It met in executive session twice in the interim, and finally adopted the minority report of the Zoning Advisory Council and decided 3 to 1 for the change (R. 94, 95).

The adopted report, among other things, said:

"The present apartment house zoning of this 2.07 acre tract at 16th and Shepherd is by no stretch of the imagination a part of any comprehensive plan as the zoning law requires. It is in fact an outstanding case of spot zoning and constitutes an opening wedge for further apartment house zoning north of this point.

"While the original zone plan of 1920 may have had some basis for its adoption, conditions have materially changed since this plan was formulated. * * * The new conditions are sufficient reason for the Zoning Commission to modify the original plan to conform. Of most importance perhaps is the fact that Piney Branch Parkway has been considerably widened and extended in the last 13 years at a considerable expenditure of

> public funds, definitely separating the private development north and south of the Parkway at 16th Street. South of the Parkway the zoning and development has been consistently and properly of the multi-family type. North of the Parkway to the District Line the development is entirely detached, single-family residence of the most restricted character with the sole exception of the parcel in question, which is thus granted a special privilege not enjoyed by any other property owner north of Piney Branch Parkway * * *. In this case the enlargement of Piney Branch Parkway has made it a definite physical barrier between the multi-family development to the south and the subdivision and development with single-family detached homes of acreage property in the Crestwood section immediately to the north and west." (R. 92, 93)

The Zoning Commission, in adopting this minority report, stated in its minutes:

> "The Commission also desired to be recorded as emphasizing the fact that in its opinion the residential 60 A area classification of parcel 70/100 (permitting the erection of an apartment house) is spot zoning bearing no relation whatsoever to any comprehensive zone plan for this area; and, further, that the recent detached home construction in the section of 16th Street north of Piney Branch Parkway has definitely determined and settled for many years its restricted character." (R. 94, 95)

(The 60 A area referred to above relates to the classification in effect prior to the issuance of the Zoning Commission's order of November 7, 1941.)

The principles of law in cases involving consideration by the courts of regulations, orders, and rulings of administrative bodies, have been laid down by this Court in a number of instances.

In *Zahn* v. *Board of Public Works for the City of Los Angeles*, 274 U. S. 325, 328, 71 Law Ed. 1074, 1076, a zoning case paralleling this one, this Court said:

> "* * * the settled rule of this Court is that it will not substitute its judgment for that of the legislative body

charged with the primary duty and responsibility of determining the question. * * *'' (Citing cases.)

On March 11, 1946 in the case of *U. S.* v. *Pierce Auto Freight Lines,* Number 74, October Term 1945, the Court said:

> "We think the court misconceived not only the effects of the Commission's action in these cases but also its own function. It is not true, as the opinion stated, that ' * * * the courts must in a litigated case, be the arbiters of the paramount public interest.' This is rather the business of the Commission, made such by the very terms of the statute. The function of the reviewing court is much more restricted. It is limited to ascertaining whether there is warrant in the law and the facts for what the Commission has done. Unless in some specific respect there has been prejudicial departure from requirements of the law or abuse of the Commission's discretion, the reviewing court is without authority to intervene. It cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, if that has support in the record and the applicable law."

In the case of *Dobson* v. *Commissioner of Internal Revenue,* decided December 20, 1943, rehearing denied February 14, 1944, 320 U. S. 489, 501, 88 L. ed. 248, 256, this Court said,

> "But 'the judicial function is exhausted when there is found to be rational basis for the conclusions approved by the administrative body.' " (Citing numerous cases.)

In *Interstate Commerce Commission* v. *Union Pacific R. R. Co.,* 222 U. S. 541, 547, 56 L. Ed. 308, 311, the Court said:

> "It (the court) will not consider the expediency or wisdom of the order, or whether, on like testimony, it

> would have made a similar ruling. 'The findings of the commission are made by law prima facie true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' * * *"

See also *Standard Oil Co.* v. *Marysville,* 279 U. S. 582, 584, 73 L. Ed. 856, 859, which states,

> "We need not labor the point, long settled, that where legislative action is within the scope of the police power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for the determination of courts, but for that of the legislative body on which rest the duty and responsibility of decision". (Citing cases.)

and *Commissioner of Internal Revenue* v. *Scottish American Investment Company,* 323 U. S. 119, 124, 89 L. Ed. 113, 116, in which this Court stated that,

> "The judicial eye must not in the first instance roll about searching for evidence to support other conflicting inferences and conclusions which the judges or the litigants may consider more reasonable or more desirable."

See also *Pacific Coast Box and Basket Company* v. *White,* 296 U. S. 176, 185, 80 L. Ed. 138, 146; *U. S.* v. *Chemical Foundation,* 272 U. S. 1, 14, 71 L. Ed. 131, 142.

That the Courts below substituted their judgment for that of the Zoning Commission is evident from a cursory examination of the record. The Court of Appeals characterized the Zoning Commission's order as spot zoning (R. 153). The Zoning Commission (R. 95) said its order was to correct spot zoning. The report of the Zoning Advisory Council which was adopted by the Commission characterized the zoning existing previous to the order of November 7, 1941 as spot zoning.

The Court of Appeals (R. 154) said the Commission's comprehensive plan of zoning "had long been and still

makes Shepherd Street * * * the dividing line * * *." The majority report of the Zoning Advisory Council, which was rejected by the Commission for other reasons, states: "The Council is aware that there are equities involved beyond money values fixed by zoning, and it admits that if no zoning existed, and should at this time be established 'de novo' it would recommend a uniform 'A' Restricted for the whole district * * *" (R. 90). The report which was adopted by the Commission states that the zoning prior to November 7, 1941 "is by no stretch of the imagination a part of any comprehensive plan as the zoning law requires" (R. 92). The Zoning Commission "also desired to be recorded as emphasizing the fact that in its opinion (the then zoning) is spot zoning bearing no relation whatsoever to any comprehensive zone plan for this area" (R. 95).

The Court of Appeals said that until the order in suit was issued, lot 70/100 was the northwest corner lot of the less restricted zone (R. 154), but the map (R. 162A) shows that this is an isolated parcel of land separated from the remainder of the less restricted zone by a bridge and a park development (R. 92). The Court of Appeals says that this parcel is an appropriate site for an apartment house (R. 154). Section 413 of the District of Columbia Code, *supra*, provides that the zoning regulations "shall be uniform for each class or kind of building throughout each district".

The Court of Appeals in its opinion stated that, "In view of the acute housing shortage it (the order in suit) bore a negative relation to the public welfare" (R. 154).

The record is silent as to any acute housing shortage in 1941. There is nothing in the record to indicate that there was a shortage of apartment house sites in the District, so that it would be necessary, to relieve a housing shortage which may have existed in 1941, to rezone properties so as to permit the erection of apartment houses in established residential, single-family dwelling districts. Furthermore there is not now and there never has been any shortage of

sites. The shortage is wholly one of labor and materials.

The District Court, in its opinion (R. 44, 45 and 46), discusses the purchase of the property by respondent Poretsky, and the steps he took in preparation for his plan to erect an apartment house. This fact was covered by the majority report of the Zoning Advisory Council, and was before the Commission (R. 90). The District Court then discusses the location of the property and its previous assessment for taxation purposes (R. 45). These facts were also before the Zoning Commission. In any event this is all irrelevant to proper zoning.

The District Court states that the owners of the property on the other side of Shepherd Street have raised no objections to the erection of an apartment house on the property in question (R. 45). The property immediately across the street is owned by Glen Pincock and his wife, Carolyn Pincock, as tenants by the entirety, and the adjoining tract by Helen V. Ehle, both of whom acquired their lands, either directly or through intervening owners, from respondents Machen, with a covenant in the deeds inserted by the Machens barring them from challenging the erection of an apartment house on parcel 70/100 (R. 63, 148).

The District Court then again mentions the location of the property, its conclusion that it would not interfere with the air and light of the buildings on the property of your petitioners, the requirements of the building regulations as to accommodation for automobiles, and concludes that the erection of an apartment building on this property would not impair the health, safety, morals, convenience, order, prosperity, or general welfare of the District of Columbia. The Zoning Commission was by statute required to consider these facts, and it is presumed it did so in reaching its conclusion, which was, of course, to the contrary, as evidenced by their order of November 7, 1941 and the minutes of the meeting at which that order was decided (R. 92, 93).

In setting aside the zoning order of November 7, 1941 the Court below transferred to itself the police power vested in the Zoning Commission.

This Court in *Dakota Central Telephone Company* v. *South Dakota,* 250 U. S. 163, 184, 65 L. Ed. 910, 924, said:

> "But as the contention at best concerns not a want of power, but a mere excess or abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power. This must be since, as this court has often pointed out, the judicial may not invade the legislative or executive departments so as to correct alleged mistakes or wrongs arising from asserted abuse of discretion".

And in *Miller et al.* v. *Schoene,* 276 U. S. 272, 279; 72 L. Ed. 568, 571, the Court said:

> "And where the public interest is involved, preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property." (Citing cases.)

II.

The action of the Zoning Commission in promulgating its order of November 7, 1941 was amply supported by the evidence before it, was in furtherance of a comprehensive zoning plan for the District of Columbia, and was not unreasonable, arbitrary, or capricious.

Much of what has been said above with respect to the evidence supporting the Zoning Commission's order of November 7, 1941 applies here. Such order was issued in furtherance of a comprehensive zoning plan, and is not unreasonable, arbitrary, or capricious.

After the widening and extension of Piney Branch Parkway, beginning about 1929 (R. 92), and in more recent

years, the residential section to the west and north of Piney Branch Parkway, which determined and settled the restricted character of this area (R. 95), the Zoning Commission, in conformity with a comprehensive zoning plan for the District of Columbia, rezoned parcel 70/100. Prior to that time it was the only parcel on 16th Street north of Piney Branch Parkway on which an apartment house could be erected, the other parcel of land mentioned in the record being too small to be utilized practicably for this purpose. The Zoning Advisory Council were unanimous in their view that "A" Restricted, preventing the erection of an apartment house, would be proper under a comprehensive plan (R. 90, 92).

The Council's majority recommendation that the petition be denied was obviously based solely on a consideration of money values.

The minority report of the Council pointed out (R. 92) that the zoning of parcel 70/100 prior to the order of November 7, 1941 "* * *" is by no stretch of the imagination a part of any comprehensive plan as the zoning law requires. It is in fact an outstanding case of spot zoning and constitutes an opening wedge for further apartment house zoning north of this point."

These facts show that the Court below was in error when it determined (R. 45) that the Zoning Commission had arbitrarily singled out this parcel as the sole parcel to rezone north of Piney Branch Parkway. The judgment of the Court below was clearly based on a misconception of the physical facts as well as of the law. The facts are further illustrated by the maps submitted below (R. 67 and 162A).

Conclusion

Much of what is said above is more tersely set forth in the petition for rehearing in the Court of Appeals, appearing in the record on pages 156 to 162, which this Court is respectfully asked to consider.

For the foregoing reasons it is submitted that the writ of certiorari should be granted and the judgment below reversed.

Respectfully submitted,

H. Winship Wheatley,
H. Winship Wheatley, Jr.,
Attorneys for Petitioners.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 243.

JULIUS H. WOLPE, ET AL., *Petitioners,*

v.

HARRY PORETSKY, ET AL., *Respondents.*

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

H. WINSHIP WHEATLEY,
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Attorneys for Petitioners.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Shorn of all its embellishments and distortions by respondents this case resolves itself into one question: The weight to be given to the decision of the Zoning Commission of the District of Columbia, created by law to regulate zoning in the District of Columbia (1940 Edition of the District of Columbia Code, Title 5, sections 412 et seq.). The Code provides no right of review except reconsideration by the Zoning Commission. Does such statutory silence give the District Court jurisdiction to hold a hearing de novo and substitute its judgment for that of the Zoning Commission and thereby destroy the well recognized strong presumption that a quasi judicial body, appointed because of its technical knowledge of the subject matter and clothed with authority by The Congress to decide issues, properly performed its duty? Though many decisions of the Supreme Court of the United States are collaterally indicative, the question of the status of a decision of the Zoning Commission of the District of Columbia remains unsettled and because of its far-reaching consequence and great public importance it should be decided in this case.

It is respectfully submitted that the contention that the issues in the case are moot is wholly and completely without substance or merit.

Respectfully submitted,

H. WINSHIP WHEATLEY,

H. WINSHIP WHEATLEY, JR.,

Attorneys for Petitioners.

No. 243

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OCTOBER TERM, 1945.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

LOUIS OTTENBERG,
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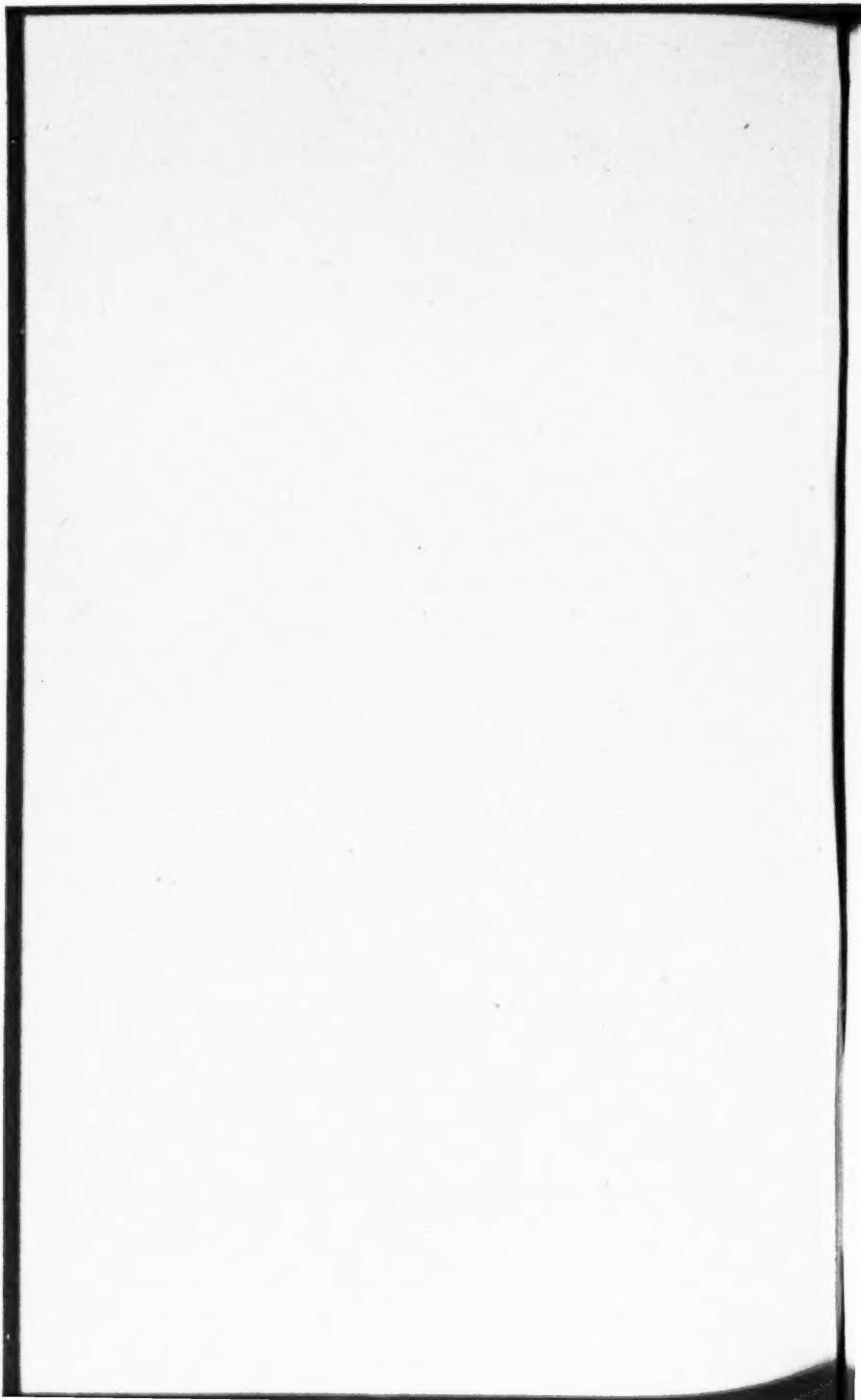
PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.



SUBJECT INDEX.

TABLE OF CASES.

STATUTES AND RULES CITED.

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STATEMENT OF MATTER INVOLVED.

This case involves a simple question of fact—the restoration of the zoning of a city block known as Parcel 70/100 in the District of Columbia. A single piece of property was arbitrarily re-zoned by the Zoning Commission (R. 154). Its action was vacated by the District Court and this was affirmed on appeal. That no question of general or public importance is involved, is evidenced by the fact that the Zoning Commission refused to take any appeal (R. 75). The litigation followed established local procedure. The question involved is moot.

FACTUAL SUMMARY.

Pursuant to the Zoning Act[1] the Zoning Commission established a comprehensive plan of zoning in 1920 under which the center line of Shepherd Street, Northwest, between 14th Street and 17th Street was made the dividing line between single family dwellings to the North and multiple dwellings or apartment sites to the South. Parcel 70/100 is located at 16th and Shepherd Streets, Northwest, in the southern or apartment area. From 1920 to 1941, some or all of said Parcel could have been used for apartment purposes and from 1933 to 1941 all of it was zoned for that use. The Parcel is separated from all present and probable future housing by public parks and public streets (R. 154). The unusual topographical elevation of the Parcel showing its practical utilization as an apartment site and its impracticability for use for detached single-dwelling residences appears at large in Findings of Fact IX (R. 53-54 and 103-107). "The lot is therefore an exceptionally appropriate site for an apartment house" (R. 154).

After respondent Poretsky had made a careful investigation of the zoning history and availability of the Parcel as an apartment house (R. 49-50), and after he had contracted to purchase the Parcel as an apartment site and spent more than $25,000.00 on account of deposits on the purchase price, plans, financing, engineering, etc. (R. 51), and after he had filed his application and plans for an apartment building on this site (R. 51) the Zoning Commission in November, 1941, without attempting a comprehensive change of said zoning plan arbitrarily and capriciously (R. 55) singled out this Parcel for re-zoning from an apartment use to detached single-dwelling use (R. 53).

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[1] "An Act to regulate the height, area, and use of buildings in the District of Columbia and to create a Zoning Commission, and for other purposes", approved March 1, 1920, D. C. Code 1940, Title 5, Secs. 412 et seq.

Poretsky then instituted this action against the Zoning Commission in the District Court of the United States for the District of Columbia for the restoration of the apartment zoning (R. 3-12). That Court held that "The erection of an apartment building upon this property would not impair the health, safety, morals, convenience, order, prosperity or general welfare of the surrounding area or the District of Columbia" (R. 55), and that "The action of the Zoning Commission in re-zoning Parcel 70/100 on November 7, 1941, as aforesaid, was unreasonable, arbitrary, capricious and void, and should be vacated and set aside" (R. 55).

In compliance with the Court's order, the Zoning Commission in April, 1943, restored zoning of the Parcel as an apartment site and decided not to appeal (R. 75).

Thereafter the present petitioners were permitted to intervene and appeal the judgment of the District Court (R. 78-79), which judgment was then affirmed by the United States Court of Appeals for the District of Columbia (R. 153-154). Each of said Courts viewed the Parcel before rendering judgment (R. 102, 112, 154).

ARGUMENT.

1. The Findings of the trial Court show clearly and definitely that the action of the Zoning Commission in destroying the apartment zoning of the Parcel in November, 1941, was not an exercise by that body of its lawful power to prevent an injurious invasion of an area, but was an unreasonable, arbitrary and capricious attempt to single out a particular Parcel and forbid its use under an established zoning. This was an unwarranted invasion of the rights of respondent under the circumstances of this case. *Nectow* v. *Cambridge*, 277 U. S. 183, 72 L. ed. 842, 48 S. Ct. 447.

The Zoning Commission acts under the police power. But this is not unlimited, and when the Commission transcended that power to the injury of a citizen, its action was

subject to the review by the Courts. *Nectow* v. *Cambridge, supra.*

The District Court held that the action of the Zoning Commission had been "arbitrary and unreasonable" (R. 55). The Court of Appeals said (R. 154):

> "We find nothing, either in the record or on a view of the premises, which tends to support the order. Even apart from the housing shortage, it would have borne no positive relation to the public welfare and would have been arbitrary and unreasonable. In view of the acute housing shortage it bore a negative relation to the public welfare. The District Court was clearly right in setting it aside, and the Commission has properly acquiesced in the correction of its error."
>
> F. R. C. P. Rule 52 (a).

This was no substitution of the opinion of those Courts for the opinion of the Zoning Commission. That body had illegally invaded the rights of the respondents and "since a necessary basis for the support of that invasion is wanting, the action of the zoning authorities comes within the ban of the 14th Amendment and cannot be sustained." *Nectow* v. *Cambridge, supra.*

2. When respondent Poretsky filed his action for injunctive and other relief (R. 3-12) he followed a procedure long established in the District of Columbia and approved by the Court of Appeals. *Bugher* v. *Gottwals,* 60 App. D. C. 340, 54 F. (2d) 451; *Dorsey* v. *Gottwals,* 61 App. D. C. 41, 57 F. (2d) 407; *Garrity* v. *District of Columbia,* 66 App. D. C. 256, 262 and footnote, 86 F. (2d) 207; *Hazen* v. *Hawley,* 66 App. D. C. 266, 272, 86 F. (2d) 217, cert. den. 299 U. S. 613, 81 L. ed. 452.

The Supreme Court has recently held:

> "Matters relating to law enforcement in the District are entrusted to the courts of the District. Our policy is not to interfere with the local rules of law which they fashion, save in exceptional situations where egregious error has been committed.

"Where the choice of the Court of Appeals of the District of Columbia in local matters between conflicting legal conclusions seems nicely balanced, we do not interfere. District of Columbia v. Pace, 320 U. S. 698, 702; Busby v. Electric Utilities Union, 323 U. S. 72, 74-5. The policy of deferring to the District's courts on local law matters is reinforced here by the fact that the local law now challenged is long established and deeply rooted in the District."

Fisher v. *United States,* No. 122. October Term, 1945, decided June 10, 1946, loc. cit. P. 10.

The question of the administrative remedy was not raised in petitioners' motion for leave to intervene or their intervening petition. It was raised for the first time on the appeal. It has no place or pertinency here.

Furthermore, there is nothing in the zoning law in the District of Columbia, *supra,* indicating finality in the determinations of the Commission, but, as stated in the *Dorsey* case, *supra,* the action of the Zoning Commission will receive judicial scrutiny and decision where the action of the Commission interferes with the general rights of a landowner without regard to public safety, morals or general welfare.

3. By its unanimous action of April 8, 1943, the Zoning Commission made the decision of the Court its decision, and it restored the apartment zoning of Parcel 70/100 which had existed since 1933 (R. 75). That was the object of the suit. With that object accomplished, no further controversy existed.

Commercial Cable Co. v. *Burleson,* 250 U. S. 360, 63 L. ed. 1030.
Alejandrino v. *Quezon,* 271 U. S. 528, 70 L. ed. 1071.
United States v. *Alaska S. S. Co.,* 252 U. S. 113, 64 L. ed. 808.

CONCLUSION.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent Poretsky.

WILLIAM C. SULLIVAN,
Attorney for Respondents Machen.